

MOTION FILED
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NO. 83-916

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v

ALLAN WAYNE MORTON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

AND
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

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Pursuant to Rule 36.3 of this Court
Bruce Warren Rush hereby moves for leave
to file an Amicus Curiae in this case
and accompanies this motion with 40 copies
of the proposed brief.

This Amicus Curiae brief which Mr. Rush hereby submits, supports Col. Morton's position in this litigation, although Col. Morton's attorney in this case (for reasons not clearly understood by Mr. Rush) has not yet consented to such filing even though the Solicitor General has consented. As a result this motion for leave to file is required.

I

"Facts and questions of law that have not been" and "reasons for believing they will not adequately be presented by the parties" are:

A. The constitutional limitations imposed by the Fifth Amendment on any asserted claim of sovereign immunity in the Morton Case under 42 USC 659.

B. The substantial jurisdictional defect in the Alabama garnishment order itself caused by a lack of sub-

ject matter jurisdiction over Col. Morton's salary earned, payable and located in Alaska.

As also stated in the Summary of Argument in the brief below, an examination by Rush of the litigants briefs discloses that the litigants are concentrating on the following:

C. The lack of personal jurisdiction as a substantial jurisdictional in the underlying judgment, and

D. Limitations imposed on sovereign immunity by judicial decision and interpretation in 708 F 2d 659 under 42 USC 659.

A review of the briefs indicates that the litigants are not adequately presenting the issues as stated in paragraphs A and B above; yet, the Morton Case decision can be affirmed on the basis of paragraphs A and B or C and D.

In addition as a safety precaution Mr. Rush prefers to have Col. Morton succeed on all four issues, A, B, C and D.

II

Mr. Rush supports the decision in the Morton Case and it is in his best interest to do so, because:

1. If this court affirms the Morton Case in 708 F 2d 68 or writes an opinion similar to it, then "in the interest of justice" under the doctrines of this in Gondeck v Pan American World Airways, (1965) 382 U.S. 25,27 this court has the power to and should reverse its 1984 decisions in the Rush Case(below) in which it has recently denied certiorari and rehearing. See also: U.S. v Maryland for Meyer, 382 U.S. 158 and the Levin Case in 381 U.S. 41; U.S. v Ohio Power Co., (1957)353 U.S. 98.
2. In this Morton Case (No. 83-916; 708 F 2d 680) certiorari was grant-

ed on Feb. 23, 1984 and oral argument is scheduled for April 25, 1984. The Morton Case is in direct conflict on critical constitutional issues with the Rush Case (in No 83-382 in ths Court) in which this Court denied certiorari on Jan. 9, 1984 and denied rehearing on Feb. 27, 1984.

CONCLUSION

A favorable decision in the Morton Case can result from different combinations of the four issues outlined above in A, B, C and D and can result in affirming the Morton Case as reported in 708 F 2d 680. Issues A and B should not be neglected, and they are covered by the following Amicus Curiae brief by Mr. Rush.

Wherefore, Mr. Rush by this motion asks this Court to approve the filing of his Amicus Curiae Brief.

Respectrully submitted,

Daniel B. Blake

DANIEL B. BLAKE, III
Attorney for Mr. Bruce
Warren Rush, Amicus
Curiae

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SUPPORT OF RESPONDENT

Mr. Bruce Warren Rush, the AMICUS CURIAE
listed on the cover of this brief specif-
ically requests to affirm the Morton Case in
the United States Court of Appeals for the
Federal Circuit as reported in 708 F 2d
680.

Pursuant to Rule 36 of this Court
this Amicus Curiae brief is submitted in
support of the respondent, Col Morton,
accompanied by a Motion for leave to file
this Amicus Curiae brief pursuant to Rule
36.3.

OPINION BELOW

The opinion of the Court of Appeals
in this case is reported in 708 F2d 680,
and a statement of the case is on page 682
and in column 1 on page 683 of that report.

The Appellate Court below decided: (I)
that the United States was not entitled
to immunity from suit (and from liability
to Col. Morton) for deductions made from
his salary pursuant to a void gar-
nishment order of an Alabama Court; and,
(II) that the U. S. Government was obli-
gated to make restitution to Col. Morton
for its part in confiscating Col. Mor-

ton's salary in violation of the Fifth Amendment by honoring an order or writ:

(1) when substantial jurisdictional defects are involved in the garnishment order (a) because of such defects in the underlying judgment, or (b) because of such defects in the garnishment order itself (such as a lack of subject matter jurisdiction over Col. Morton's salary), and

(2) when before making the deduction the U. S. Government was notified of a jurisdictional defect which was substantial.

o

STATEMENT OF INTEREST

Mr. Rush's interest in filing this brief follow:

1. Not only does Mr. Rush support the decision in the Morton Case in 708 F 2d 680 but it is in his best interest to do so, because:

a. If this Court affirms the Morton Case in 708 F 2d 680 or writes an opinion similar to it, then "in the interest of justice" under the doctrine of this Court in Gondeck v Pan American World Airways, 382 U.S. 25, 27 this Court has the power to and should reverse its 1984 decision in the Rush Case (below) in which it has recently denied certiorari and rehearing.

b. In this Morton Case (No. 83-916; 708 F 2d 680) certiorari was granted on Feb. 23, 1984 and oral argu-

ment is scheduled for April 25, 1984. The Morton Case is in direst conflict on critical constitutional issues with the Rush Case (in No. 83-382 in this Court) in which this Court denied certiorari on Jan. 9, 1984 and denied rehearing on Feb. 27, 1984.

c. This reversal of the Rush Case as suggested in a above could be done (1) suo sponte, (2) by a second petition for rehearing as in the Pan American Case, or (3) by granting a conditional petition for rehearing pending the outcome of the Morton Case; and at about the time of oral argument in the Morton Case we suggest that this Court suo sponte make arrangements for granting such a conditional rehearing in the Rush Case, which it has power to do. See: U.S. v Maryland for Use of Meyer, 382 U.S. 158 and Levin Case in 381 US 41. Also See: U.S. v Ohio Power Co., 353 U.S. 98.

d. In Gondeck v Pan American Case

(above) in 382 U.S. at pp. 26-27 this

Court stated:

"We are now appraised... of 'intervening circumstances of ... substantial ... effect' (Rule 58(2)), justifying application of the ... doctrine that 'the interest of finality'... must yield where the 'interests of justice' would make unfair the strict application of our rules ... (a)nd... this petitioner stands alone in not receiving (compensation and justice)."

e. In U.S. v Maryland for the Use of

Meyer, (above) 382 U.S. 158 this Court granted conditionally a second rehearing pending its review of a similar but conflictig case. It later reversed its earlier decisions after that review.

SUMMARY OF ARGUMENT

There are four pivotal issues in
in the scope of the Morton Case in 708
F 2d 680 which are concisely stated in
in the two parts of the the two follow-
ing sentences.

Limitations on Sovereign Immunity

1. In addition to confirming a limitation imposed on U.S. sovereign immunity by judicial decision as was done in 708 F 2d 680 under 42 USC 659, --
2. This Court can and should by judicial decision also confirm a Fifth Amendment constitutional limitation on sovereign immunity by estopping the U.S. Government from asserting it when a party like Col. Morton seeks restitution from the U. S. Government or its officers for confiscat-
his salary (by garnishment in violation
of the Fifth Amendment). This point is
*ing

emphasized in I of the Argument below.

A Substantial Jurisdictional Defect

3. As reported in the Morton Case in 708 F 2d 680 the lack of personal jurisdiction over Col. Morton in the underlying judgment can cause a substantial jurisdictional defect in the garnishment order, but in addition, --
4. There can be a substantial jurisdictional defect in an Alabama garnishment order itself (such as a lack of subject matter jurisdiction over Col. Morton's salary earned, payable and located in Alaska) which make the U. S. Government liable for restitution, if it was notified of the probable defect before confiscation. This point is emphasized in paragraph II of the Argument below.

ARGUMENT

Pursuant to the Summary of Argument above, this Argument and this Amicus Curiae Brief concentrate on two basic concepts: I. The The Fifth Amendment Imposed Limitation On Any Asserted Sovereign Immunity Issue In The Morton Case, and II. The Substantial Jurisdictional Defect In The Alabama Garnishment Order Itself caused by a lack of subject matter jurisdiction over Col. Morton's salary. They are analyzed below.

I

THE FIFTH AMENDMENT IMPOSES A CONSTITUTIONAL LIMITATION AGAINST THE U. S. GOVERNMENT ASSERTING SOVEREIGN IMMUNITY IN THE MORTON CASE UNDER
42 USC 659

In the past this Court has continued its practice of protecting the rights individual citizens against the uncontrolled arbitrary power of government and its officers and it has done so by inter-

preting and refining the meaning of the due process clause under the Fifth Amendment. To do otherwise will undermine the basic protections intended by the Amendment. Accordingly this Court should estop the U. S. Government from asserting sovereign immunity in this Morton Case in which his salary is being confiscated by the government and its officers under 42 USC 659. This is especially so when (as here) the Congress took affirmative action by enacting 42 USC 659 and as a result inaugurated, initiated and induced the salary confiscation by its federal officers. In support of the above, note and analyze the following:

1. See and review the "Limitations of the Rule" imposed by judicial decision in U. S. v Lee in 106 US 196, 1 S Ct 240 and note in particular paragraphs 5, 6, 7, and 8 in the summary on page 240 of

this long opinion written in 1882.

2. Note also the severe limitations placed on the Rule in Kawanananako v Polybank, 1907) in 205 U.S. 349, 27 S Ct 526, 527 which is quoted below:

"A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Note it can be stated that for Col. Morton the law and authority on which his right to protection* is the Fifth Amendment and its due process clause which protects his salary against confiscation.

3. While this court may prefer to allow the Congress to develop routine exceptions to the rule we believe that this court has the constitutional duty to explicitly confirm these constitutional limitations in this Morton Case to which they apply.

* is based

II

A SUBSTANTIAL JURISDICTIONAL
DEFECT IN THE GARNISHMENT ORDER
ITSELF

1. It can be asserted in the Morton Case: a. That (irrespective of personal jurisdiction) the Alabama Garnishment Order (or Writ) was void and invalid in itself because the Alabama Court which issued it lacked subject matter jurisdiction over Col. Morton's salary which was earned , payable and located in Alaska, and b. That the U. S. Government was legally liable to Col. Morton under the Fifth Amendment for any confiscation or unlawful withholding of Col. salary after Col Morton notified the U.S. Air Force of the potential jurisdictional and substantial jurisdictional defect.

2. The following points and authorities should be noted:

a. Even if the underlying judgment was perfectly valid; nevertheless,

an Alabama garnishment (or writ) here would be unconstitutional (under the Fifth Amendment) for lack of subject matter jurisdiction over Col. Morton's salary earned, payable and located in Alaska. (See: Morton v U. S., (1982) 708 F 2nd 680, 689, Note 10)

b. As stated at page 686 of this Morton v U. S. Case (708 Fed 2nd 680, 686 (2):

"... Competent jurisdiction... means both subject matter jurisdiction and persona jurisdiction." and

"...constitutional requirements of due process have long been applied to garnishment procedures, citing (cases)".

c. Note 38 C. J. S. page 327 and Robinson Coe v ROTex Inc., 320 NE 2d 157, 161 (6) which state in effect that:

"Jurisdiction of ... (Col. Morton) is not enough without jurisdiction of the res(or salary)."

d. Also see Worldwide Volwswagon v Woodson, 444 U.S. 286, 296; 62 LEd 490, 501 where Justice Byron White stated:

"... We recently abandoned the out-worn rule of Harris v Balk. (1905), 198 US 215, 49 LED 1023, ... that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor ..." (even under circumstances in which the U.S. Air Force was doing business in Alabama)"

CONCLUSION

For all of the foregoing reasons, Mr. Rush, as Amicus Curiae on this brief asks this Court to affirm the decision of the United States Court of Appeals for the Federal Circuit as reported in U. S. v Allan Wayne Maoton in 708 F 2d 680.

Respectfully submitted,

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